COA NO. 48454-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO OCHOA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stanley J. Rumbaugh, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED OCHOA'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT BARRED HIM FROM CROSS-EXAMINING THE STATE'S CHIEF WITNESS ON HER MOTIVE TO FABRICATE THE ALLEGATIONS AGAINST HIM.

The State points out it disclosed the U-Visa evidence in discovery. Brief of Respondent (BOR) 11. Good for the State. If it hadn't, the State would be staring down a Brady[1] violation. State v. Huerta-Castro, __P.3d.__, 2016 WL 6995379, at *10-12 (N.M. Ct. App. Nov. 29, 2016) (prosecution violated Brady in failing to disclose U-Visa application made by mother of alleged victims).

Yet now the State describes the U-Visa evidence as irrelevant and incapable of aiding the defense. The State makes no attempt to address any of the cases where U-Visa evidence has been held admissible in criminal cases to show the bias of a complaining witness. Romero-Perez v. Commonwealth, 492 S.W.3d 902, 906-07 (Ky. Ct. App. 2016); State v. Valle, 255 Or. App. 805, 814-15, 298 P.3d 1237 (Or. Ct. App. 2013); State v. Hernandez, 269 Or. App. 327, 328, 332, 344 P.3d 538 (Or. Ct. App. 2015); State v. Del Real-Galvez, 270 Or. App. 224, 225, 230-31, 346 P.3d

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (government must disclose exculpatory evidence to the defense as matter of due process).

1289 (Or. Ct. App. 2015). The State does not address how the principles enunciated in those cases apply to Ochoa's case.

The State equates the constitutional right to show the bias of a complaining witness with an "appeal to nationality or other prejudices." BOR 15 (citing State v. Avendano-Lopez, 79 Wn. App. 706, 718-19, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007, 917 P.2d 129 (1996)). This is unfair to defense counsel and mocks the Sixth Amendment right to cross-examination. Avendano-Lopez was a prosecutorial misconduct case. The prosecutor questioned the defendant about his immigration status in a manner that was "calculated and planned to incite the jury's passion and prejudice. The question was entirely unrelated to the subject matter of the preceding line of cross-examination and was completely irrelevant to the material issues of the case." Avendano-Lopez, 79 Wn. App. at 719-20. The State perversely relies on the egregious behavior of the prosecutor toward the accused in Avendano-Lopez to argue the accused in this case cannot present his defense.

Ochoa's counsel did not seek to make a naked appeal to nationalist prejudice, as the prosecutor in Avendano-Lopez did. Ochoa's counsel articulated a theory of bias connected to the pending U-Visa application. This is not a novel theory. It is a specific application of the general rule that "[a] defendant has a right to cross examine the State's witness

concerning possible self-interest in cooperating with the authorities." State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537, review denied, 94 Wn.2d 1021 (1980) (right to confrontation violated where defense not permitted to cross-examine State's witness of pending prosecution).

"Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." Abel, 469 U.S. at 52. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

To obtain a U-Visa, the applicant must be "helpful" in investigating and prosecuting qualifying criminal activity. 8 C.F.R. § 214.14(b)(3). Isidor had a reason to shape her accusations and testimony to conform to the types of crimes that not only make her eligible for a U-Visa but a good candidate for one. She had a reason to disclaim a prior relationship with Ochoa, which undercut Ochoa's consent theory. She had

a reason to claim rape, assault by strangulation, and kidnapping, which are qualifying crimes for a U-Visa. 8 C.F.R. § 214.14 (2013) (qualifying criminal activity includes sexual assault, felonious assault, and kidnapping). Whether she really harbored that motivation was for the trier of fact to decide, not the trial court and not the State on appeal. See State v. Buss, 76 Wn. App. 780, 788, 887 P.2d 920 (1995) ("The issues of credibility and the weight to be given to evidence of McWhirt's bias was for the jury to decide, not the court."), abrogated on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999).

In arguing against admissibility, the State points out the prosecution's office policy was to take no action on U-Visa applications while a case is pending. BOR 11-12; Ex. 42. What the State fails to grasp is that the withholding of a decision on the U-Visa application until after the criminal trial gives particular motivation for Isidor to testify in a manner that would secure conviction. It is the prospect of getting something of value from the prosecution that provides the incentive to testify in a manner that will please the prosecution.

The same dynamic is present in cases involving complaining witnesses who testify with the hopes of a prospect of cutting a deal with the prosecution. The "searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution" is of particular

importance. United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992) (quoting Jenkins v. Wainwright, 763 F.2d 1390, 1392 (11th Cir. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2290, 90 L. Ed. 2d 730 (1986)). "The importance of such cross-examination does not depend upon whether or not some deal in fact exists between the witness and the government." Lankford, 955 F.2d at 1548 (trial court violated right to confrontation in refusing to allow cross-examination concerning drug arrest of witness's son, which provided possible motive for witness's cooperation with the prosecution); see also People v. Balayants, 343 Ill. App. 3d 602, 605, 798 N.E.2d 826 (Ill. Ct. App. 2003) ("A defendant need not show that the witness has been promised leniency; the evidence must only give rise to the inference that the witness has something to gain by testifying."). "What counts is whether the witness may be shading his testimony in an effort to please the prosecution." Greene v. Wainwright, 634 F.2d 272, 276 (5th Cir. 1981). "A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception." Greene, 634 F.2d at 276 (quoting Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980)).

What counts for impeachment purposes is the hope of getting something from the government in return for aiding the prosecution's

effort. Bias is present when a complaining witness accuses someone of committing a crime against her, submits a U-Visa application based on the accusation, and testifies for the prosecution in the resulting criminal case. The prospect of a U-Visa gave Isidor motive to shape her accusation and testimony in a manner that gives her the best chance of getting it. See Valle, 255 Or. App. at 814 ("Simply put, M. had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.").

The State says the U-Visa application has little or no relevancy because it is dated three months after the rape, as if to suggest Isidor was unaware of the U-Visa until after she accused Ochoa of the crimes. BOR 11. That suggestion is baseless. Isidor had previously put in a request to get legal status based on being a crime victim in another matter, but she was not approved. 3RP 91-93. She subsequently put in another U-Visa application based on what Ochoa allegedly did. 3RP 91; Ex. 42. She knew the U-Visa was a means to secure permanent residency and legal employment before she accused Ochoa. To the extent the State suggests a complaining witness must immediately apply for a U-Visa after the alleged crime in order for U-Visa evidence is relevant to show bias, there

is no such requirement in the case law or common sense. Isidor secured an attorney to help her with the U-Visa. Ex. 42. It takes time to find an attorney and for that attorney to do the work. The timing of the application goes to weight, not admissibility.

The State says there was no evidence that Isidor was in imminent danger of deportation. BOR 11. The cases addressing admissibility of U-Visa evidence do not require such imminent danger. This argument goes to weight, not admissibility. A U-Visa applicant can have a motive to please the prosecution without being in imminent danger of deportation. Those without legal status live in constant fear of being discovered by government authorities. The specter is omnipresent. Further, the U-Visa gives the successful applicant the ability to legally work in the U.S., which provides another reason why a complaining witness would want it, regardless of whether deportation is an imminent threat.

"[I]n a criminal case, to allow the defendant no cross-examination into an important area is an abuse of discretion." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). As argued, the U-Visa issue was an important area for cross-examination to reveal witness bias. Further, "[i]t is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the state's case." York, 28

Wn. App. at 36. There is no dispute Isidor was essential to the State's case. Where, as here, the witness sought to be cross-examined is the government's "star" witness "'providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased.'" Greene, 634 F.2d at 275 (quoting United States v. Summers, 598 F.2d 450, 460 (5th Cir. 1979)).

Speculation that jurors would violate their oaths and be prejudicially affected by evidence of Isidor's immigration status does not justify its exclusion. "ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987). Showing the bias of a complaining witness, a crucial prosecution witness, is always a valid defense. "Given the nature of the U-Visa program, we must conclude that a criminal defendant's right to effectively probe into a matter directly bearing on witness credibility and bias must trump any prejudice that would result from the jury's knowledge of the victim's immigration status." Romero-Perez, 492 S.W.3d at 907. At minimum, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State has failed to do so here. Speculation as to the effect of jurors biases do not overcome the right to a defendant to conduct reasonable

cross-examination on a subject relevant to the witness's motive to lie. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

The State curiously claims the U-Visa issue "appears not to have been an actual issue at trial." BOR 12. The reason why the U-Visa issue was not an actual issue at trial was due solely to the fact that the court would not let Ochoa make it an issue at trial. The defense theory presented to the jury would have been altered to highlight Isidor's bias had it been allowed. A consent theory is completely consistent with a theory that Isidor had a motive to testify falsely, including a motive to deny having a prior relationship with Ochoa. As it turned out, the defense theory presented was consent without a basis for arguing why Isidor would fabricate her allegations. Result: defense destroyed.

The State makes the extraordinary claim that the error is harmless beyond a reasonable doubt because Ochoa benefited from not being able to present evidence that the chief witness against him had a motive to testify falsely against him. BOR 17. The State claims the defense theory would have been she "planned the entire thing" in advance to set herself up for a U-Visa and the neighbors "conspired" with her to frame Ochoa. BOR 13, 17. The State is in no position to dictate what the defense theory would have been had the evidence been admitted to show bias. The

course and outcome of the trial could have been different. Exclusion of the bias evidence altered the defense strategy in ways that are immeasurable and unknowable based on the cold appellate record. Ochoa testified in his own defense after the trial court precluded him from presenting a defense theory of bias based on the U-Visa issue. As a strategic matter, Ochoa may not have testified had the defense been allowed to present the U-Visa evidence. The State on appeal is setting up a false reality, assuming things would have played out the same had the U-Visa evidence been presented.

It can be said that the defense would not have advanced the silly theory posited by the State. There would be no need to argue Isidor plotted in advance. The defense theory could have been that Isidor took the opportunity to exploit the situation that occurred to her benefit by exaggerating what happened between Ochoa and herself. No advanced planning required.

Contrary to the State's claim, defense counsel would not have forced to theorize the neighbors "conspired" with Isidor. BOR 17. The neighbors interacted little with Isidor and were not in a good position to know whether Ochoa ever had a relationship with Isidor. The Guillens had not seen Ochoa with Isidor, but they hardly knew her and had only fleeting interaction with her. 5RP 99, 106, 115-16. Trailer park manager

Garcia gave no testimony that he knew anything of Isidor's personal life. According to Ochoa, they met up at motels, the relationship was carried out in secret, and had been dormant for a while until they met up again that night. 9RP 14-15, 38-40. In this respect, there is no need to argue the neighbors conspired to tell a false story. The theory would be they did not know about the relationship, and that they did not witness what happened inside the trailer.

The U-Visa evidence was capable of being part of an intelligent and realistic defense theory. The neighbors described their observations of what they saw and heard that night. There is corroboration for the unlawful imprisonment charge because one neighbor saw Ochoa dragging Isidor back inside the trailer. 5RP 117-18. Neighbors heard screaming. 5RP 51-52, 99-102, 107, 116-17, 12; 6RP 98-102, 109. Isodor had some observable injuries (6RP 85-86, 92-93; 7RP 20-25, 38, 41, 46, 81; 8RP 28), although none to her genitalia and no injury to her neck or throat that necessarily showed choking. 6RP 88; 7RP 34, 43-44, 46-49, 56. From that evidence, jurors could conclude something bad happened inside the trailer; that the interaction turned violent.

But the fact remains that Isidor is the only witness to claim Ochoa entered her home without consent, raped her, and strangled her. The burglary, rape and second degree assault charges hinge on the credibility

of her testimony. For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Assuming "the damaging potential of the cross-examination" regarding the U-Visa were "fully realized," the result is that Isidor's credibility is undermined. Van Arsdall, 475 U.S. at 684. The trial court's exclusion of evidence from which a jury could have inferred that Isidor had a personal interest in testifying in a certain manner was harmful because the jury was not fully informed of matters relevant to an assessment of Isidor's credibility, which was essential to the State's case. Valle, 255 Or. App. at 815. The jury did not have information that was relevant to whether Isidor had a motive to fabricate her allegations against Ochoa.

2. THE COURT ERRED IN FAILING TO COUNT OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

The trial court ruled as follows: "Strangulation is not necessary to accomplish unlawful imprisonment or forcible rape and is a separate and distinct act that was found by the jury to have occurred, and that's what supported the Assault in the Second Degree conviction. So I don't think it is the same criminal conduct, and the offenses don't merge." 13RP 20-21.

As argued in the opening brief, the court misapplied the law in relying on a double jeopardy standard. BOA 46-47; see State v. Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (for purposes of double jeopardy, "if each count arises from a separate and distinct act, the defendant is not potentially exposed to multiple punishments for a single act."); State v. Borsheim, 140 Wn. App. 357, 367-68, 165 P.3d 417 (2007) (double jeopardy violated where court failed to instruct jury it must find "separate and distinct acts" for convictions and did not otherwise make "the need for a finding of 'separate and distinct acts' manifestly apparent to the average juror."). A double jeopardy violation claim is distinct from a same criminal conduct claim and require separate analyses. State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006).

Further, there is no authority for the proposition that two crimes cannot be same criminal conduct unless one offense is "necessary" to accomplish another. In determining same intent, it is sufficient that one crime furthered the other. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The State does not contend otherwise. The trial court misapplied the law.

The State argues the assault did not further the second rape, which occurred after Isidor ran out of the residence and was taken back inside. BOR 21-22. But Ochoa does not make this argument on appeal. Ochoa's

argument is that the assault furthered the first rape, which took place inside the residence before she ran outside.

The State claims the assault did not further the first rape, alleging Ochoa "strangled the victim gratuitously before raping her" and "did not use the strangulation to keep her quiet." BOR 22. The record does not support this interpretation of the evidence.

Isidor testified she ran for the door after seeing Ochoa standing next to her bed, at which point he grabbed her and started to choke her. 6RP 9. By choking, she meant he put one hand on her mouth and one hand on her neck. 6RP 10. She explained "He didn't want me to speak." 6RP 10. He then got on top of her, took off her clothing, took off his clothing and "told me to keep quiet." 6RP 11. When she tried to get him off her, he covered her mouth and grabbed her neck, telling her to be quiet. 6RP 56-57. He kissed her arms and legs and then raped her. 6RP 12. The evidence shows the assault by strangulation was to keep Isidor quiet and subdue her so that he could rape her without intervention from her sleeping daughter or anyone else who might otherwise hear her. In this manner, the assault by strangulation furthered the rape. Consistent with the evidence, the jury found Ochoa committed the assault with sexual motivation. CP 129. The jury's finding shows Ochoa committed the assault to accomplish the objective of raping Isidor.

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997) is distinguishable. In Grantham, two rapes were not continuous and thus failed to qualify as same criminal conduct. Grantham, 84 Wn. App. at 859. There was a gap in time between the two rapes committed by different means, during which time the defendant and the victim argued and the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App.at 859. "In Grantham, the evidence supported a conclusion that the criminal episode had ended with the first rape, only to reoccur when a new argument erupted." State v. Palmer, 95 Wn. App. 187, 191-92, 975 P.2d 1038 (1999) (two rapes were same criminal conduct where violence was continuous and patterned and defendant did nothing in between the two rapes that was not related to raping the victim, even though defendant renewed his threats between the two rapes and had an opportunity to reflect).

Unlike Grantham, the facts of Ochoa's case show the assault and rape were part of a continuous course of conduct. There was no interruption between the assault and the rape during which time Ochoa paused and reflected on what he was doing. The course of action was fluid and compressed. The assault was done to quiet Isidor and overcome her resistance to being raped. The assault furthered the rape. Also unlike

Grantham, here we have a jury finding that Ochoa committed the assault with sexual motivation, which shows he committed the assault in order to commit the rape. CP 129. A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The criminal objective was to rape Isidor, and the assault was done to accomplish that objective.

The State's citation to State v. Brown, 100 Wn. App. 104, 115, 995 P.2d 1278 (2000), rev'd on other grounds, 147 Wn.2d 330, 58 P.3d 889 (2002) is inapposite. BOR 23. The sequence of actions involving the rape and first degree assault and their factual relation to one another in that case is unclear. Brown, 100 Wn. App. at 106-07, 110. A factual comparison with Ochoa's case is therefore unhelpful.

Further, the appellants in Brown only argued those two offenses "nearly" satisfied the same criminal conduct standard insofar as same place, time and victim were concerned. Id. at 111. There was no argument that same intent was present. The appellants' argument was not same criminal conduct, but rather that the serious violent offenses at issue were not subject to consecutive sentencing because they were not "separate and distinct" offenses, even though they were not same criminal conduct. Id. The State argued all offenses which do not constitute same

criminal conduct must necessarily be "separate and distinct" for purposes of the sentencing statute governing multiple serious violent offenses. Id.

The Court of Appeals agreed with the State. Id. In the course of doing so, the court cursorily stated the rape and assault did not constitute the same criminal conduct "because rape and assault have separate intents." Id. at 115. As the appellants did not argue the same criminal conduct test was satisfied, this statement could be viewed as dicta. "A statement is dicta when it is not necessary to the court's decision in a case" and as such is not binding authority. Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914, review denied, 178 Wn.2d 1022, 312 P.3d 651 (2013).

In any event, case law interpreting the "same criminal intent" language in RCW 9.94A.589(1)(a) distinguishes it from the mens rea element of the particular crime involved. The inquiry in this context is not whether the crimes share a particular mens rea element but whether the offender's objective criminal purpose in committing both crimes is the same. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990); State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013), review denied, 182 Wn.2d 1022, 347 P.3d 458 (2015). Brown does not discuss this legal theory. "In cases where a legal theory is not discussed in the opinion, that case is not

controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

Also unlike Brown, the jury expressly found beyond a reasonable doubt that Ochoa committed the assault by strangulation with sexual motivation. CP 129. This finding shows he committed the assault with the objective of committing the rape.

The State suggests two crimes must be committed simultaneously to qualify as same criminal conduct. BOR 24. That is not the law. Offenses need not be simultaneous. State v. Porter, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Sequential crimes qualify as "same criminal conduct" when one furthers the other and the offenses involve the same victim, time and place. Porter, 133 Wn.2d at 183. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

The State suggests the continuous, uninterrupted sequence of conduct standard for showing same criminal intent is inapplicable to cases involving physical and sexual violence. BOR 23. It cites no case to support the suggestion. The legal standard for showing same objective intent for same criminal conduct does not change from one set of crimes to

another. It applies to all. See Palmer, 95 Wn. App. at 191-92 (two rapes were same criminal conduct where violence was continuous and patterned); State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990) (kidnapping furthered child molestation); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (child molestation furthered child rape), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); Phuong, 174 Wn. App. at 547-48 (counsel ineffective in failing to argue unlawful imprisonment and attempted rape were same criminal conduct, where defendant restrained victim to accomplish the rape); State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (counsel ineffective in failing to argue kidnapping and rape were the same criminal conduct, where the kidnapping was committed to further the rape).

3. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS MUST BE ADDRESSED UNDER NEWLY REVISED RAP 14.2.

RAP 14.2 addresses appellate costs. The rule was amended effective January 31, 2017. It now provides: "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an

adult offender does not have the current or likely future ability to pay such costs." Of particular importance: "When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." Any request for appellate costs must be measured under this new standard.

B. CONCLUSION

For the reasons stated above and in the opening brief, Ochoa requests reversal of the convictions.

DATED this 6th day of February 2017

Respectfully Submitted,

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Transmittal Letter

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